Supreme Court, U.S.
FILED
DEC 17 2003
OFFICE OF THE CLERK

(15)

No. 02-1809

IN THE

Supreme Court of the United States

J. ELLIOTT HIBBS, Director, Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, *et al.*,

RESPONDENTS.

On Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS[1]

Interest of Amicus Curiae

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's oldest civil rights law firm. LDF and its Director-Counsel, Thurgood Marshall, litigated *Brown v. Board of Educ.*, 347 U.S. 483 (1954) and numerous other civil rights cases before this Court and the lower federal courts, including suits brought pursuant to 42 U.S.C. § 1983.

In the period following *Brown*, LDF or the NAACP were involved in hundreds of lawsuits through which *Brown* was implemented in our nation. Among these were cases that invalidated various aid programs or other stratagems by which the *Brown* mandate was sought to be evaded. *E.g.*, *Norwood v. Harrison*, 413 U.S. 455 (1973) (state-provided textbooks for students attending all-white private schools established in the wake of public school desegregation orders); *Allen v. County Sch. Bd. of Prince Edward County*, 198 F. Supp. 497 (E.D. Va. 1961) (tax credits for contributions to all-white private schools established after public schools were closed in the face of federal court desegregation order).

In none of these suits was the Tax Injunction Act, 28 U.S.C. § 1341, which is the focus of the instant

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[1]Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus*, made any monetary contribution to its preparation.

litigation before this Court, a bar to federal jurisdiction. LDF files this brief as *Amicus Curiae* because of its concern that the result sought by Petitioner here would foreclose the availability of this federal forum for such purposes and to vindicate federal Constitutional rights.

Summary of Argument

The interpretation of the Tax Injunction Act advanced by Petitioner here, and supported by the United States, has never previously been adopted by this Court. It would foreclose the availability of a federal forum to enforce Constitutional rights (such as First and Fourteenth Amendment rights) that are denied by the mechanism of tax deductions, credits, or exemptions. Had this reading of the statutes in question been in place at the time, this Court could well have been unable to decide *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), and it would have lacked subject matter jurisdiction in *Mueller v. Allen*, 463 U.S. 388 (1983) and *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973), notwithstanding the importance that the Congress attached to the federal forum in enacting 42 U.S.C. § 1983, *see Mitchum v. Foster*, 407 U.S. 225 (1972). Particularly in light of the very substantial time that elapsed between the statute's enactment and the articulation of the interpretation now pressed by Petitioner and the United States, this result is not required by the language or history of the law and should be rejected by this Court.

ARGUMENT

Amicus files this brief to bring to the Court's attention a perhaps as yet unnoticed and undesirable effect of a ruling in favor of Petitioner in this matter, particularly if it is grounded to any extent in arguments that have been presented to the Court by the United States.

In its filing in support of Petitioner, the United States has argued that the statute at issue in this case, the Tax Injunction Act, 28 U.S.C. § 1341, was modeled upon and should be interpreted *in pari materia* with the Anti-Injunction Act enacted in 1867, 28 U.S.C. § 7421(a). Respondents demonstrate in their Brief that the earlier law was not intended to, and has never been read by this Court to, bar all involvement by federal courts in matters of tax administration, but merely to prevent *pendente lite* interruptions of the flow of federal tax collection and tax revenues. Therefore, we believe, the federal tax act offers no support for the broad ouster of federal jurisdiction to, *e.g.*, enforce constitutional rights in § 1983 suits by enjoining the inappropriate granting of tax *exemptions* or tax *credits* by state officials.

A contrary ruling by this Court — especially if it rests explicitly upon the interpretive model proffered by the United States — would have widespread and severe consequences. If it had been in force at the time when *Brown v. Board of Educ.*, 347 U.S. 483 (1954) began to be implemented, as Respondents point out in their Brief it would have foreclosed attacks in federal court on state aid to segregated schools through tax exemption or tax credits such as were involved in *Allen v. County Sch. Bd. of Prince Edward County*, 198 F. Supp. 497, 501-03 (E.D.

Va. 1961), *aff'd in pertinent part sub nom. Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 232-33 (1964).

As Respondents also observe, this reading of the law could create incentives for states to fashion new forms of indirect (tax exemption or credit) aid of debatable constitutionality. A program of state support, through tax deductions or tax credits, for the purchase of textbooks to be used by children attending private schools established to avoid public school desegregation, for example, *see Norwood v. Harrison*, 413 U.S. 455 (1973), could not have been challenged on Fourteenth Amendment grounds in the lower federal courts if the government's interpretation had been accepted at that time.

Far worse, however, is the fact that the government's "*in pari materia*" argument would support a similar interpretation of the federal Anti-Injunction act. Just as the government's argument (had it been the law at the time) would have meant that this Court lacked subject matter jurisdiction in *Mueller v. Allen*, 463 U.S. 388 (1983) and *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973), the same interpretation of the *federal* Anti-Injunction Act could have meant that the federal courts were without subject matter jurisdiction even to entertain *Green v. Kennedy*, 309 F. Supp. 1127, *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970), *subsequent ruling*, *Green v. Connally*, 330 F. Supp. 1150, *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971) and *Allen v. Wright*, 468 U.S. 737 (1984).

Such a wrongheaded interpretation of Congress' intent would have meant that the Court would not have

been able to decide *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). For in that case, the Court would have lost jurisdiction because of mootness had the government been permitted — as it sought to do — to restore the school's tax-exempt status after this Court granted review, see 461 U.S. at 585 n.9. The reason this did not happen was that the United States Court of Appeals for the District of Columbia Circuit did have subject matter jurisdiction[2] to hear a challenge to the government's tax-exemption policy and to issue an injunction *pendente lite* to preserve the *status quo ante* with respect to Bob Jones University or any other institution which maintained a policy of racial discrimination. *See id.*[3]

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[2]In *Wright v. Regan*, 656 F.2d 820, 836 n.52 (D.C. Cir. 1981) (R. Ginsburg, J.), *rev'd on other grounds sub nom. Allen v. Wright*, 468 U.S. 737 (1984), the Court of Appeals held that the Anti-Injunction Act did not apply where the plaintiffs challenged the grant of tax exemptions to segregated private schools. This Court ultimately ruled in *Allen v. Wright* that the plaintiffs lacked standing, but there appeared to be no question of subject matter jurisdiction.

[3]It was not until nearly a year after the *Bob Jones* ruling that this Court read into the Anti-Injunction Act — even when its reach was confined, as it still is, to suits that would reduce the collection of government revenues — an exception where "[Congress] has not provided an alternative remedy," *South Carolina v. Regan*, 465 U.S. 367, 378 (1984). Thus, at the time the injunction issued in the *Wright* case, see *supra* note 2, it is likely that the suit would have been barred if the Anti-Injunction Act were interpreted to apply.

Of course, no one (including, apparently, the United States or the Internal Revenue Service) thought it did apply, and it was not among the reasons given by the District Court for dismissing the suit. *Wright v. Miller*, 480 F. Supp. 790 (D.D.C. 1979), *rev'd sub*

The persuasiveness of the government's argument is further weakened by the fact that it is being urged so late in the history of the tax injunction statutes. Because the Tax Injunction Act limits subject matter jurisdiction, the failure of the parties and of this Court to raise it in *Mueller* or *Nyquist* underscores that the Act simply has never before been read in the manner now advanced by the Petitioner and the government.

It is also surprising, if the government is correct, that the federal Anti-Injunction Act was neither discussed nor relied upon in *Allen v. Wright*. A holding that the lower courts lacked subject matter jurisdiction because of the *statute* — an issue of which the Court must have been aware because it was discussed by now-Justice Ginsburg in the opinion supporting the judgment being reviewed, see *supra* note 2 — would have avoided the constitutional standing decision that the Court announced in *Wright*, an approach to adjudication that under this Court's longstanding traditions is strongly preferable. *E.g.*, *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (Rehnquist, J.) and cases cited.[4]

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nom. Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981), *rev'd sub nom. Allen v. Wright*, 468 U.S. 737 (1984).

[4]"'Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.' *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *Mobile v. Bolden*, 446 U.S. 55, 60 (1980); *Kolender v. Lawson*, 461 U.S. 352, 361 n.10 (1983), *citing Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This is a 'fundamental rule of judicial restraint.' *Three Affiliated Tribes of Berthold Reservation v. Wold Engineering*, 467 U.S. 138 (1984)." 472 U.S. at 854.

The Court should not change this longstanding reading of the tax injunction acts, especially when to do so would deprive litigants of a federal forum in which to raise Constitutional claims through 42 U.S.C. § 1983. As the Court recognized in construing another federal anti-injunction law, "Section 1983 was . . . a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the peoples federal rights—to protect the people from unconstitutional action under color of state law . . . ." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Nothing in the language or history of the Tax Injunction Act suggests that Congress was departing from this historic purpose in 1937.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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